

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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DEC 19 2002

In the Matter of

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Amendment of Section 73.202(b),  
Table of Allotments,  
FM Broadcast Stations.  
(Chillicothe and Ashville. Ohio)

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MM Docket No. 99-322  
RM-9762

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

TO: Chief, Media Bureau

**OPPOSITION TO PETITION FOR RECONSIDERATION**

Secret communications II, L.L.C. ("Secret"), licensee of FM broadcast station WFCB, Chillicothe, Ohio, by and through its attorneys and pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429 (2001), hereby timely opposes the Petition for Reconsideration of the *Report and Order*, released on October 18, 2002, in the above-captioned proceeding filed by Franklin Communications, Inc., North American Broadcasting Co. and WLCT Radio Incorporated (jointly, the "Petitioners"). See *Chillicothe and Ashville, Ohio*, 17 FCC Rcd 20,418 (2002).

In the *Report and Order*, the Commission granted Secret's Petition for Rule Making to reallocate Channel 227B from Chillicothe to Ashville, Ohio, and to modify the license of WFCB to specify Ashville as the station's new community of license. Petitioners on reconsideration request that the Media Bureau "set aside" its *Report and Order*, Petition for Rule Making at 6, and challenge the Bureau's failure to grant their request that it "impose a permanent condition on *grant* [of Secret's reallocation request], requiring that Secret and all future licensees provide service on Channel 227B from Secret's currently authorized construction permit site, . . ."

Comments and Objections of Joint Parties at 13. As demonstrated below, the Bureau properly

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denied this unprecedented, unwarranted and draconian request. Accordingly, Petitioners' Petition for Reconsideration should be promptly denied.

### Discussion

As an initial matter, Secret notes that Petitioners do not and cannot argue that Ashville is undeserving of a first local transmission service. Rather, Petitioners merely repeat in this proceeding the arguments made in their prior Comments and Objections and again request the imposition of their unwarranted and burdensome condition. It is well-settled that a petitioner on reconsideration may not simply reargue its earlier position, but must demonstrate material errors or omissions in the underlying decision, raise new facts, or demonstrate changed circumstances. *See. e.g., Barnco, Inc.*, 15 FCC Rcd 7194, ¶ 3 (1999), *Bennett Gilbert Gaines*, 8 FCC Rcd 3986, ¶ 3 (Rev. Bd. 1993). Petitioners have not met this burden. Petitioners earlier argued that Secret may at some time in the future apply to move its transmitter site toward Columbus, Ohio. The Bureau, however, concluded that it cannot impose a permanent transmitter site freeze condition based simply on pure speculation and in disregard of a number of good and valid reasons why a licensee might seek in the future to change its transmitter site. Petitioners have not shown that the Bureau's conclusion is in error.

Petitioners argue that two prior decisions, *Newnan* and *Peachtree, Georgia*, 7 FCC Rcd 6307 (1992) and *Oceanside and Encinitas, California*, 14 FCC Rcd 15302 (1999), mandate the imposition of a transmitter site freeze condition. However, neither of these cases goes as far as the Petitioners would have the Bureau go in this case. Those two cases are part of a line of cases setting forth the Commission's policy favoring relaxation of the spacing rules at the allotment stage where no transmitter site or other technical change is being proposed and the stations involved are pre-1964 grandfathered short-spaced stations. In *Newnan*, the seminal case in this

area, the Commission did not impose any transmitter site freeze condition, but did make the requested re-allotment based on the licensee's existing transmitter site. In *Oceanside*, as Petitioners point out, the Commission imposed the limited condition that the licensee, when it filed its application to modify its city of license, specify its currently authorized site in the application. Even in that case, however, the Commission did not permanently restrict the location of the station to that site. Thus, in *Oceanside*, the main case on which Petitioners rely, nothing would have prevented the existing licensee or any future licensee from later seeking to relocate the station's transmitter site.

In this case, after noting that "Station WFCB is a licensed . . . pre-1964 grandfathered short-spaced station that does not meet the current separation requirements now set in Section 73.207 of the Commission's Rules," *Report and Order* at ¶ 3, the Bureau specifically addressed the applicability of *Newnan* and its progeny. Immediately thereafter, the Bureau stated:

. . . Secret Communications notes that due to unresolved zoning issues regarding its originally proposed site, it filed an application to change the Station WFCB transmitter site. That application was granted on January 25, 2002. Secret Communications has commenced operation at that site and the covering license application was granted on March 29, 2002. Accordingly, Secret Communications requests that its reallocation proposal be considered at its existing site.

*Report and Order* at ¶ 4 (footnotes omitted)." Thus, as in *Newnan*, the Bureau recognized that Secret was not proposing any transmitter site relocation and therefore granted the reallocation request. This case is entirely consistent with *Newnan*. Moreover, the Bureau's statements reveal Petitioners' claim for what it is, a the red herring. Petitioners are not actually seeking enforcement of "clear precedent," *Petition for Reconsideration* at ¶ 5, requiring licensees to

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<sup>1/</sup> The Commission also noted that "[b]ecause Secret **Communications** does not propose a change in transmitter site, there will be no loss of service to any population." *Report and Order* at ¶ 4 (emphasis added).

specify their existing transmitter sites in construction permit and license applications filed pursuant to community of license change proceedings. Instead, Petitioners seek to drastically expand *Newnan* from simply requiring a licensee to specify its existing transmitter site to *barring* the licensee from obtaining a change in its transmitter site.<sup>2/</sup> Such an outcome is unsupported by any prior Commission precedent and is furthermore unsupportable on the facts of this case.

**As** the Bureau recognized in its *Report and Order*, there are many good and valid reasons why a licensee would want to change its transmitter site. Therefore, a blanket freeze condition that would forever foreclose the relocation of WFCB would be contrary to the public interest as it would prevent the Commission from reviewing the facts of an individual case to determine whether relocation would serve the public interest.

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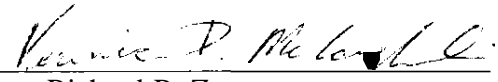
<sup>2/</sup> **As** the Bureau correctly held, if at some time in the future after the reallotment to Asheville has been implemented, Secret or another licensee were to attempt to move the WFCB closer to Columbus, Petitioners would be free to object at that time. *Report and Order* at ¶ 5. Petitioners' reliance on the letter decision involving WEGY(FM) to contradict this holding is unavailing. *See Letter to John Garziglia, Esquire*, dated February 19, 2002 attached to Petition for Reconsideration as Exhibit **A**. That case, which did not involve the *Newnan* policy, stands only for the proposition that an objector who fails to participate at the rule making stage may be precluded from initially raising its objections to a reallotment when the licensee later seeks to implement the change. Moreover, as the case did not involve application of the *Newnan* policy, the Bureau rejected the objector's arguments based on the fact that "a successful rule making petitioner which subsequently files an implementing modification application is not limited to the reference coordinates previously specified in the context of a rule making proceeding." Garziglia Letter at 3. Finally, the Bureau held that there was no evidence that the licensee had misrepresented its true intent regarding the location of its transmitter by specifying in its construction permit application a site different from the allotment coordinates set forth in the rule making proceeding. *Id.*

**Conclusion**

For these reasons, the Media Bureau should promptly dismiss or deny in its entirety the Petition for Reconsideration.

Respectfully submitted,

Secret Communications II, L.L.C.

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Dated: December 19, 2002

## CERTIFICATE OF SERVICE

I, Renee Williams, do hereby certify that I have this 19<sup>th</sup> day of December, 2002, mailed by first-class United States mail, postage prepaid, copies of the foregoing **“OPPOSITION TO PETITION FOR RECONSIDERATION”** to the following:

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